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No.

In The

Supreme Court of the United States

October Term, 1992

JAMES WALKER,

Cross-Petitioner,

vs.

THE CITY OF NEW YORK,

Cross-Respondent.

Cross-Petition for Writ of Certiorari to the United States Court of Appeals for the Second Circuit

CROSS-PETITION FOR WRIT OF CERTIORARI

DOUGLAS S. LIEBHAFSKY
Counsel of Record
PAUL K. ROWE
CLAIRE D. CHAPPELL
WACHTELL, LIPTON, ROSEN & KATZ
Attorneys for Cross-Petitioner
299 Park Avenue
New York, New York 10171
(212) 371-9200

3114
Lutz Appellate Services, inc.
(800) 3 APPEAL • (800) 5 APPEAL • (800) BRIEF 21

33pp

QUESTION PRESENTED

1. Can a plaintiff state a claim for relief pursuant to 42 U.S.C. § 1983 with respect to a police officer's conduct in conspiring with prosecutors to suppress evidence in violation of the plaintiff's *Brady* rights, where the police officer has made disclosure of the *Brady* material to the prosecutors?

PARTIES TO THE PROCEEDING

Cross-Petitioner, the plaintiff-appellant below, is James Walker.

Cross-Respondent, the defendant-appellee below, is the City of New York.

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No.

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OPINIONS BELOW

The Judgment and Opinion of the United States Court of Appeals for the Second Circuit, entered September 4, 1992, and from which review is sought, is reported at 974 F.2d 293 (2d Cir. 1992) and is reprinted in the Appendix to the Petition for a Writ of Certiorari filed by the City of New York beginning at page 1.

The City of New York served its Petition for a Writ of Certiorari on December 2, 1992.

The Judgment, Memorandum Order and Opinion of the United States District Court for the Southern District of New York, entered January 15, 1992, is not reported in the Federal Supplement reporters, but can be found at 1992 WL 8160 (S.D.N.Y.), and is reprinted in the Appendix to the Petition for a Writ of Certiorari filed by the City of New York beginning at page 25.

STATEMENT OF JURISDICTION

The United States Court of Appeals for the Second Circuit entered Judgment, from which review is sought, on September 4, 1992. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY AND CONSTITUTIONAL PROVISIONS INVOLVED

This case arises under the Civil Rights Act of 1871, 42 U.S.C. § 1983, which is reprinted in the Appendix to the Petition for a Writ of Certiorari filed by the City of New York. The question presented for review in this Cross-Petition involves the Due Process Clause of the Fourteenth Amendment.

United States Constitution, Article XIV § 1

> All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

This case arises out of the 1971 prosecution and conviction of Cross-Petitioner James Walker in Kings County in the State of New York. The relevant background of the case was summarized in the opinion of the United States Court of Appeals for the Second Circuit as follows:

> Plaintiff James Walker spent nineteen years in prison for a crime that it now appears he did not commit. In 1971 police officers and prosecutors covered up exculpatory evidence and committed perjury in order to insure Walker's conviction despite their knowledge of Walker's probable innocence. After unearthing facts critically undermining the state's case against him, Walker won his release from prison in 1990. Walker then filed suit under 42 U.S.C. § 1983 against the City of New York in the United States District Court for the Southern District of New York...

Pet. App. 2-3 (references "Pet. App." are to the appendix to the Petition for Certiorari).

Walker's amended complaint ("Complaint")[1] alleges that the City of New York (the "City") is liable for violations of his constitutional rights because the City failed adequately to train and supervise both the City police and the staff of the Kings County district attorney's office. Specifically, the Complaint alleges that the City did not train police officers and Assistant District Attorneys ("ADAs") not to commit or suborn perjury and not to

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1. The Complaint is reprinted in the Appendix to the Cross-Petition beginning at page 1.

suppress exculpatory evidence. Walker alleges that the City's failure to train constituted deliberate indifference to his constitutional rights and was the proximate cause of his 19 years' wrongful imprisonment.

The City moved pursuant to Fed. R. Civ. P. 12(b)(6) to dismiss Walker's complaint for failure to state a claim. The United States District Court for the Southern District of New York granted the City's motion, holding that failure to train and supervise municipal employees only constitutes deliberate indifference by the City where it should be obvious that such training and supervision is required, and that, to the contrary, it should be clear to prosecutors and police officers *without* training that they should not commit or suborn perjury, or suppress exculpatory evidence. The District Court further held that any failure to train police officers could not have caused Walker's injury, since the only duty police officers have under *Brady v. Maryland*, 373 U.S. 83 (1963), is to turn exculpatory evidence over to the prosecutor's office, and Walker did not allege that that had not occurred.

On appeal, the Second Circuit reversed the District Court's holding with respect to the sufficiency of Walker's pleading of deliberate indifference. However, the Court of Appeals affirmed the dismissal of Walker's "police *Brady*" claims, holding that the conduct of a police officer who turns over *Brady* material to a prosecutor's office can never violate a criminal defendant's *Brady* rights:

> Since Walker has alleged that the police shared all exculpatory evidence with the prosecutors, Walker's claim against the police relating to the suppression of exculpatory evidence fails to state a claim upon which relief can be granted.

Pet. App. at 15.

The City then filed a petition for a Writ of Certiorari, which Walker opposes. This Cross-Petition by Walker on the "police *Brady*" issue is advanced only in order to secure plenary review of the Second Circuit's decision in the event this Court does grant the City's petition.

REASONS FOR GRANTING THE CROSS-PETITION

I.

A PLAINTIFF CAN STATE A CLAIM FOR A POLICE *BRADY* VIOLATION WHERE A POLICE OFFICER KNOWINGLY ASSISTS, AND CONSPIRES WITH, PROSECUTORS IN THE SUPPRESSION OF *BRADY* MATERIAL PREVIOUSLY DISCLOSED TO THEM BY THE OFFICER.

The allegations relevant to this Cross-Petition are that at least three Assistant District Attorneys and one police detective actively participated in a conspiracy which involved them in the concealment of two discrete, highly significant exculpatory facts; in the suppression of numerous documents in violation of a court disclosure order; and in the commission and subornation of perjury. The complaint alleges that the conspirators (among other things) concealed the fact that a trial witness had previously identified as complicit in the crime an individual who (as both police and the prosecutors learned) was actually in custody at the time, and the further fact that an eyewitness to the crime had identified a man *other* than Walker in a line-up following Walker's arrest. Complaint ¶¶ 17-20, 24. Indeed, the police officer and one Assistant perjuriously testified that the line-up had not occurred at all, and suppressed a written memorandum made after the line-up. Complaint ¶ 28.[2]

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2. The following are the details of the police/prosecutor conspiracy alleged in Walker's complaint. On June 1, 1970, William Powell and at least one

(Cont'd)

The Second Circuit held that these allegations did not state a claim under § 1983 because a police officer's only *Brady* obligation is to make disclosure to the *prosecutor*, and here the

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(Cont'd)

other man robbed an armored truck delivering cash to a Brooklyn check-cashing agency, and in the course of the robbery William Powell shot and killed the owner. Complaint ¶¶ 6-7. Another man involved in the crimes used a sawed-off shotgun to knock unconscious Jose Ruiz, a guard. James Walker was arrested as the man wielding the shotgun on April 23, 1971, by Detective Robert Powell. Complaint ¶¶ 8-9, 16. The basis for the arrest was a purported eyewitness identification by one John Snider, a drug addict with a substantial criminal record, who came forward in the fall of 1970 — several months after the crimes — in response to a large reward offered by the victim's widow. Complaint ¶¶ 10, 12. On April 23, 1971, Walker took part in a lineup (the "April 23 Lineup"), at which assault victim Ruiz identified a lineup participant other than Walker as the man who hit him with the shotgun. Complaint ¶¶ 17, 29. Shortly after April 23, 1971 Detective Powell and the Assistant District Attorney handling the matter, one J.P. Zsuffa, confirmed that Melvin Givens, a friend of Snider, had been in prison on June 1, 1970. This was significant because Snider had previously accused Givens of participating in the crimes along with Walker. Complaint ¶¶ 10, 19-21. Desiring to "close the books" on the crimes despite what they now knew to be Snider's unreliability, ADA Zsuffa, Detective Powell and other ADAs conspired with Snider to suppress the false implication of Givens and the April 23 lineup incident. Thus, Snider's grand jury testimony omitted all mention of Givens, while falsely accusing Walker. Complaint ¶¶ 25-27. At a hearing held pursuant to *United States v. Wade*, 388 U.S. 218 (1967), ADA Zsuffa and Detective Powell both perjured themselves in order to conceal Ruiz's non-identification of Walker: Zsuffa testified flatly that the April 23 lineup never took place; Detective Powell testified that he recalled no such lineup and knew of no lineup records. Complaint ¶ 28. Despite a September 1971 order of the trial court, the conspirators did not turn over to Walker's counsel exculpatory documents, including: several statements and reports reflecting Snider's false accusation of Givens; the official photographs and stenographic minutes of the April 23 lineup; and the statement taken from Ruiz at the lineup. Complaint ¶¶ 28-29. Finally, at trial, Detective Powell testified to the effect that Snider's testimony against Walker was consistent with Snider's initial statement to the police. *Id.*

police officer had indeed shared the exculpatory information with the ADAs. In effect, the rule of law adopted by the Second Circuit is that a police officer can never commit a *Brady* violation, no matter how egregious his conduct or how deeply involved he is in a conspiracy with Assistant District Attorneys to suppress *Brady* material, provided he has turned over his *Brady* material to the prosecutors. Under this rule a municipality enjoys complete immunity with respect to *Brady* violations by its police officers provided that their conduct was not concealed from the prosecutor.

The Second Circuit's rejection of Walker's "police *Brady*" claim was not based on any decisions of this Court, and neither the logic nor language of *Brady* supports the result. *Brady* imposed disclosure obligations on the "prosecution," not the "prosecutor." *Brady v. Maryland*, 373 U.S. 83, 87 (1963). *Hilliard v. Williams*, 516 F.2d 1344, 1349-50 (6th Cir. 1975), *vacated on other grounds*, 424 U.S. 961 (1976), recognizes that the police are effectively a part of the "prosecution." 516 F.2d at 1349-50; *see also, Barbee v. Warden*, 331 F.2d 842, 846 (4th Cir. 1964) ("[t]he police are also part of the prosecution"). While making *Brady* disclosure decisions is normally the province of the prosecutor, it does not follow from *Brady* that police-officer conduct cannot result in liability where the officer knowingly participates in a conspiracy with prosecutors to suppress evidence. Sharing the *Brady* material with prosecutors may itself be a critical part of such a conspiracy.

Because *Brady* spoke of "suppression by the prosecution," courts since *Brady* have found constitutional violations whenever exculpatory information was suppressed, whether by the prosecutor or by the police. *See Freeman v. State of Georgia*, 599 F.2d 65, 69 (1979), *cert. denied*, 444 U.S. 1013 (1980) ("the policeman's conduct must be imputed to the state as part of the prosecution team"); *United States v. Butler*, 567 F.2d 885, 891 (9th Cir. 1978) ("[s]ince the investigation officers are part of the prosecution, the taint on the trial is no less if they, rather than the

prosecutor, were guilty of nondisclosure"). Thus these courts, like the *Brady* Court, did not find it necessary to delineate the particular disclosure obligations of different parts of the prosecution team members in order to determine if the constitutional rights of the accused had been violated.

This Court should grant review, not only because the Second Circuit decision unjustifiably narrows *Brady*, but also because the decisions that have dealt squarely with the "police *Brady*" issue have been conflicting. Two cases, *Hilliard v. Williams*, *supra*, and *Taylor v. Hansen*, 731 F. Supp. 72 (N.D.N.Y. 1990), provide clear support for the proposition that a police officer's *Brady* duties are not *per se* satisfied by disclosure of exculpatory material to the prosecutor. In *Hilliard*, the Sixth Circuit upheld a 1983 claim against a law-enforcement officer who — like the police officer in this case — kept exculpatory evidence from the defense with the knowledge and connivance of the prosecutor. *See* 516 F.2d at 1346, 1349-51. In *Taylor*, also a 1983 case, it was "not clear from the evidence . . . whether [the identity of a potentially exculpatory witness] was concealed by [the police officer] defendants alone, or whether the prosecutor's office also had knowledge," 731 F. Supp. at 79; the court's opinion denying the police officers' summary judgment motion clearly suggests that prosecutorial knowledge, if ultimately established, would *not* supply a defense with respect to the conduct of the police officers. 731 F. Supp. at 76-79.

On the other hand, two decisions have held that the police do not have an independent duty to disclose exculpatory information to the defense. *Campbell v. Maine*, 787 F.2d 776 (lst Cir. 1986); *Hauptmann v. Wilentz*, 570 F. Supp. 351, 389 (D.N.J. 1983), *aff'd*, 770 F.2d 1070 (3d Cir. 1985), *cert. denied*, 474 U.S. 1103 (1986).

The Second Circuit opinion here offers little reasoning to support its decision. First, it notes that "it is appropriate that the prosecutors, who possess the requisite legal acumen, be charged

with the task of determining which evidence constitutes *Brady* material that must be disclosed to the defense." Pet. App. at 15. Whatever the merits of this argument generally, it should not operate to permit a police officer to stand mute when he knows that the prosecutors themselves are conspiring to suppress *Brady* material.

Next, the Court of Appeals reasoned that "[a] rule requiring the police to make separate, often difficult, and perhaps conflicting, disclosure decisions would create unnecessary confusion . . ." and "would ignore the fact that the defendant's appropriate point of contact with the government is the prosecutor and not those who will be witnesses against him." *Id.* The flaw in this logic is that it assumes there are only two alternatives — per se police immunity if *Brady* material is shared with prosecutors, on the one hand, and direct police-officer contact with the defense on the other. It is not hard to see a third alternative: a police officer who turns over *Brady* material to prosecutors and then learns that they are suppressing it should have the duty (at least) of notifying his superiors of the facts. At an appropriate level in the police chain of command a decision could be made what action to take — *e.g.*, notification of a senior member of the District Attorney's office with supervisory authority over the ADAs with whom the police officer had been dealing. Such a rule would meet the concerns expressed by the Second Circuit, while preventing the disquieting result here —under which a police officer "satisfies" his *Brady* obligations while assisting a prosecutorial violation of the very constitutional rights protected by *Brady*. A narrow rule that a police officer has *at least* the duty under *Brady* not to knowingly assist a prosecutor's suppression of *Brady* material is amply justified and would cause no conflicts with other policy goals or interests.

CONCLUSION

For the foregoing reasons, Cross-Petitioner respectfully requests that, if the Court grants the Writ of Certiorari sought by Petitioner — which Cross-Petitioner opposes — it also grants this Cross-Petition.

Respectfully submitted,

DOUGLAS S. LIEBHAFSKY
Counsel of Record
PAUL K. ROWE
CLAIRE D. CHAPPELL
WACHTELL, LIPTON, ROSEN
& KATZ
Attorneys for Cross-Petitioner
299 Park Avenue
New York, New York 10171
(212) 371-9200

Dated: January 4, 1993

APPENDIX A — AMENDED COMPLAINT OF THE UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF NEW YORK DATED JUNE 6, 1991

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

91 Civ. No. 2327 (JSM)

JAMES WALKER,

Plaintiff,

-against-

THE CITY OF NEW YORK,

Defendant.

AMENDED COMPLAINT
(JURY TRIAL DEMANDED)

Plaintiff James Walker, on knowledge as to himself and matters in which he was directly involved and otherwise upon information and belief, alleges as follows:

JURISDICTION, VENUE AND JURY DEMAND

1. Plaintiff is a New York State citizen and a resident of the Southern District of New York.

2. Defendant The City of New York (the "City") is a municipal corporation of the State of New York and is a resident of the Southern District of New York.

3. This action arises under 42 U.S.C. § 1983 and under the common law of New York. Jurisdiction is conferred on this Court by 28 U.S.C. §§ 1331, 1343 and by principles of pendent jurisidiction. Venue is proper in this Court pursuant to 28 U.S.C. § 1391.

4. On September 18, 1990, plaintiff duly served notice of the present claims pursuant to New York General Municipal Law § 50-e. More than thirty days have elapsed since such service without adjustment or payment of the claims.

5. Plaintiff demands trial by jury of all issues in this action.

FACTS PERTINENT TO ALL CLAIMS

6. At about 10:00 A.M. on June 1, 1970, at least two men robbed an armored truck delivering cash to a check-cashing facility operated by Edward Kargman ("Kargman") at 1834 Fulton Street, Brooklyn, New York (the "Robbery"). Kargman, who had been driving the truck, was shot during the Robbery; he died on or about June 10, 1970. (The Robbery and the felony murder of Kargman (the "Murder") are hereinafter referred to as the "Crimes".)

7. One of the men who committed the Crimes was William Powell ("Criminal Powell"). In October 1971, in New York State Supreme Court, Kings County (the "Trial Court"), Criminal Powell pleaded guilty to the Murder under Kings County Indictment No. 3786/71 (the "Indictment"), which charged him and plaintiff with the Crimes. As Criminal Powell admitted upon his plea, it was he who shot Kargman during the Robbery.

8. Another man involved in the Crimes (the "Shotgun Man")

used a sawed-off shotgun to knock unconscious Jose Ruiz ("Ruiz"), a guard who was accompanying Kargman and assisting with the delivery of cash.

9. The Crimes were investigated and prosecuted by the city's Police Department (the "Police Department") and by the Office of the District Attorney of Kings County (the "District Attorney"). Detective Robert A. Powell, Shield #2466, 77th Precinct ("Detective Powell"), had charge of the investigation for the Police Department. Assistant District Attorney J. Paul Zsuffa ("Zsuffa"), assigned to the District Attorney's Investigation Bureau, had charge of the investigation for the District Attorney's Office.

10. Several months after the Crimes, in or about Fall 1970, one John Snider ("Snider"), who claimed to have been an eyewitness to the Crimes, informed Detective Powell (and other police personnel) that plaintiff was the Shotgun Man. Snider further alleged that one Melvin Givens ("Givens") had also participated in the Crimes. Snider's allegations were made known to Zsuffa in or before April 1971.

11. At the time of the Crimes, both plaintiff and Givens were known to Snider as individuals who frequented the general neighborhood in which the Kargman check-cashing facility was situated. Further, Snider had on occasion seen plaintiff and Givens together in that neighborhood, and he believed them to be good friends (as was the case).

12. At all relevant times, Snider was a long-term drug addict with a significant criminal record. Snider was principally motivated to go to the police with his accusation of plaintiff and Givens by the prospect of sharing in a substantial reward (the "Reward"). Kargan's widow began offering the Reward in the summer of 1970.

13. Detective Powell and Zsuffa, as well as other police and prosecutorial personnel, were aware by no later than April 1971 of the facts alleged in paragraph "12" above.

14. In mid-April 1971, Criminal Powell was arrested and charged with the Crimes. At that point, the authorities still had no evidence implicating plaintiff in the Crimes other than Snider's purported eyewitness identification. Nor did they develop any such evidence thereafter.

15. On April 16, 1971, Zsuffa (with Detective Powell and two other Police Department detectives present) took a formal "Q and A" statement from Snider (the "April 16 Snider Statement"). In the April 16 Snider Statement, Snider repeated his accusation that both plaintiff and Givens had participated in the Crimes.

16. On April 23, 1971, Detective Powell arrested plaintiff for the Crimes. At that time, Detective Powell and other City police officers searched plaintiff's residence for evidence linking plaintiff to the Crimes. They found no such evidence.

17. On the evening of April 23, 1971, a lineup containing plaintiff and several others was conducted at the 77th Precinct stationhouse (the "April 23 Lineup"). Crime victim Ruiz at that time identified a lineup participant *other than plaintiff* as the Shotgun Man (hereinafter, the "Ruiz Identification"). Zsuffa and Detective Powell were immediately aware of the Ruiz Identification, and Zsuffa then and there took a formal "Q and A" statement from Ruiz concerning the same (the "Ruiz Lineup Statement").

18. By no later than April 23, 1971, moreover, Detective Powell, Zsuffa and other police and prosecutorial personnel had

additional grounds to believe that Snider's account of the Crimes might be unreliable: they had learned that Givens might have been incarcerated on the date of the Crimes. Zsuffa indeed prepared an official Investigation Bureau report dated April 23, 1971 (the "April 23 Report") which expressly noted the latter possibility.

19. Givens was in fact in the custody of the City's Department of Correction on the date of the Crimes. Givens accordingly could not have participated in the Crimes.

20. Shortly after April 23, 1971, Detective Powell, Zsuffa and other police and prosecutorial personnel involved in the investigation and prosecution of the Crimes learned the facts set forth in paragraph "19" above.

21. Upon learning those facts, Detective Powell and Zsuffa recognized, correctly, that Sider's wholly-uncorroborated accusation of plaintiff could no longer be credited, and that any pre-existing probable cause to prosecute plaintiff for the Crimes had now been entirely dissipated.

22. Detective Powell and Zsuffa, having no other plausible suspects for the Shotgun Man and strongly desiring to "close the books" on the Crimes, thereupon began to conspire and to act in concert with each other, and with other police and prosecutorial personnel, to do whatever might be necessary, lawful or not, to secure plaintiff's conviction and imprisonment, guilty or not, for the Crimes (hereinafter, the "Conspiracy").

23. Throughout the period of the Conspiracy (which extended at least through mid-May 1990), Detective Powell, Zsuffa and the other Conspirators pursued the Conspiracy's objectives with actual malice toward plaintiff, with utter disregard

for plaintiff's rights under the Constitutions and laws of the United States and of the State of New York, and wholly without probable cause to believe plaintiff guilty of the Crimes.

24. It was a part of the Conspiracy that Zsuffa, Detective Powell and the other Conspirators (a) would do whatever was necessary, including but not limited to the commission and subornation of perjury, to conceal from plaintiff, from plaintiff's counsel, from the Kings County Grand Jury (the "Grand Jury"), and from the Trial Court, both the fact that Snider had falsely accused plaintiff's friend Givens of the Crimes and the fact of the Ruiz Identification (such facts hereinafter, collectively, the "Exculpatory Facts"), and (b) would hold Snider out to the Grand Jury and the Trial Court as truthful in his accusation of plaintiff, notwithstanding that the Conspirators actually knew (or, but for a wanton and deliberate indifference to the truth, would have known) that the latter accusation was false.

25. In mid-June 1971, in furtherance of the Conspiracy, Detective Powell, Zsuffa and another Assistant District Attorney ("ADA Doe", a Conspirator), whose name is unknown to plaintiff but who was assigned to the Indictment Bureau of the District Attorney's Office and had charge of presenting plaintiff's case to the Grand Jury, caused Snider to be arrested and jailed as a material witness. The Conspirators then persuaded Snider to join the Conspiracy; as a result, Snider's ensuing Grand Jury testimony deliberately omitted all mention of Givens, while continuing falsely to implicate plaintiff in the Crimes.

26. The Conspirators further saw to it that the Grand Jury did not in any way learn either of the Exculpatory Facts. By reason of the suppression of those Facts, and by reason of other Conspiratorial conduct, the Grand Jury was unable to make a fair

and reliable determination as to the existence of probable cause to charge plaintiff with the Crimes.

27. In or about late June 1971, the Grand Jury returned the Indictment charging plaintiff and Criminal Powell with the Crimes. Plaintiff would not have been so indicted if the Exculpatory Facts had been disclosed to the Grand Jury and if the Grand Jury proceedings had otherwise been conducted so as to achieve a fair and reliable probable-cause determination.

28. The Conspirators continued their active pursuit of the Conspiracy following the return of the Indictment. In so doing, they committed at least the additional overt acts described in subparagraphs (a)- (g) of this paragraph 28.

(a) In order to suppress the Ruiz Identification, Zsuffa testified falsely and perjuriously, at plaintiff's October 1971 *Wade* hearing, to the effect that the April 23 Lineup had never taken place.

(b) To the same end, and at the same hearing, Detective Powell testified falsely and perjuriously to the effect that he had no recollection of the April 23 Lineup and that he knew of no records of that Lineup.

(c) Further to the same end, Assistant District Attorney Benjamin Schmier ("Schmier"), the Assistant who conducted plaintiff's *Wade* hearing and immediately-ensuing trial (and who himself was a Conspirator), deliberately failed to correct the foregoing Zsuffa-Powell testimony, despite his knowledge of its falsity.

(d) Notwithstanding the Trial Court's entry of a September 1971 order requiring disclosure of material favorable to the

defense, the Conspirators deliberately withheld from plaintiff and his trial counsel police and prosecutorial documents reflecting the Exculpatory Facts, including but not limited to: the April 16 Snider Statement; the Ruiz Lineup Statement; the April 23 Report; and Police Department reports recording Snider's accusation of Givens; and the official photographs and stenographic minutes made for the District Attorney's Office, as well as all Police Department records, of the April 23 Lineup.

(e) Detective Powell, Zsuffa, Schmier and other police and prosecutorial Conspirators further saw to it, through continued violation of their own disclosure duties, through "trial preparation" of witnesses Snider and Ruiz, and otherwise, that the defense — as well as the Trial Court and the jury — did not learn of the Exculpatory Facts in any other way at plaintiff's trial.

(f) Schmier deliberately elicited Snider's testimony accusing plaintiff of the Crimes, at both the *Wade* hearing and the ensuing trial, notwithstanding that Schmier actually knew (or, but for a wanton and deliberate indifference to the truth, would have known) that that testimony was false and perjurious.

(g) Schmier and Detective Powell further collaborated in bad faith at trial to misleadingly bolster Snider's credibility in the eyes of the jury: without disclosing the details of what Snider had told him in the Fall of 1970 — *and thus without revealing Snider's false accusation of Givens* — Detective Powell pointedly conveyed to the jury, on direct examination by Schmier, that Snider's Fall 1970 story had been entirely consistent with his trial testimony in accusing *plaintiff* of the Crimes.

29. As a result of the foregoing, and as the Conspirators contemplated and intended, the Trial Court and the jury remained

wholly unaware (i) that plaintiff's sole accuser (Snider) had made a like, indisputably *false* accusation against plaintiff's good friend Givens; (ii) that Sniders accusation of plaintiff was also false and perjurious, and was known to be so by the prosecution; and (iii) that the single witness (Ruiz) best positioned to identify the Shotgun Man had actually identified someone *other* than plaintiff as that person.

30. It was a further part of the Conspiracy that neither the Police Department nor the District Attorney's Office would pursue any additional investigation into the identity of the Shotgun Man: once having decided to "nail" plaintiff as the Shotgun Man, Detective Powell, Zsuffa and their co-conspirators avoided any steps which might jeopardize that effort; they accordingly disregarded altogether their public duties to find and prosecute the real Shotgun Man, and the latter has never been identified or apprehended.

31. The Conspiracy achieved its objectives. On October 19, 1971, following and as a direct and proximate result of a *Wade* hearing and trial rendered grossly unfair by the above-described perjury and suppression of evidence, plaintiff was convicted of the Murder (the "Conviction"). On April 5, 1972, the Trial Court sentenced plaintiff on the Conviction to imprisonment for a term of 20 years to life (the "Sentence").

32. Many years after the Conviction, plaintiff obtained evidence of the Exculpatory Facts and of the authorities' complicity in suppressing the same. Plaintiff adduced that new evidence before the Trial Court on a post-conviction motion, and on May 16, 1990, the Trial Court entered an order vacating the Conviction.

33. On June 27, 1990, following a full review of the case against plaintiff, the District Attorney joined with plaintiff in a motion to dismiss the Indictment with prejudice. The Trial Court granted the motion in an order entered that day (the "Dismissal Order", a copy of which is attached as Exhibit 1 hereto). The Dismissal Order effected a "favorable termination" of plaintiff's prosecution under applicable law.

34. Detective Powell, Zsuffa, Schmier, ADA Doe and all other police and prosecutorial personnel who joined in the Conspiracy acted at all relevant times within the scopes of their respective employments with the Police Department and the District Attorney's Office.

35. The District Attorney at all relevant times was (and is) an elected officer of Kings County, one of the constituent counties of the City, and the District Attorney's Office was (and is) funded out of the City's budget. Further, the District Attorney was (and is) designated a "local officer," rather than a "state officer," under the New York Public Officers Law (section 2); and New York has provided by statute (N.Y. County L. §§ 53, 941) that the City's constituent counties (including Kings County), and hence the City itself, shall have liability for torts committed by County officers and employees such as the District Attorney and his Assistants.

36. Notwithstanding that he had no involvement whatever in the Crimes, plaintiff was continuously held in custody therefor from age 31 through age 50. Plaintiff has maliciously and unjustly been deprived of the best years of his life for someone else's crimes; he has been subjected to degrading, dehumanizing and emotionally destructive prison conditions, and has suffered shame, indignity, isolation from society, separation from friends and family, loss of consortium and loss of earnings. Plaintiff has been damaged thereby in an amount not less than $11,000,000.

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FIRST CLAIM

37. Plaintiff repeats and realleges the allegations of paragraphs "1" through "36" above.

38. The aforesaid Conspiratorial conduct operated, *inter alia*, to deprive plaintiff of important and well-established rights under the Fourth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution, including plaintiff's right not to be significantly detained pretrial except pursuant to a fair and reliable determination of probable cause, his right to be free from bad-faith prosecution, his right to confront the trial witnesses against him, his rights to a fair trial and to due process of law, and his right to be free from cruel and unusual punishment. Such misconduct also directly and proximately caused the Conviction, the Sentence and plaintiff's nineteen years of incarceration for the Murder.

39. The foregoing violations of plaintiff's Constitutional rights, and the Conviction, the Sentence and plaintiff's incarceration for the Crimes, were further directly and proximately caused by conduct, chargeable to defendant City, amounting to deliberate indifference to the Constitutional rights of persons coming into contact with the Police Department and the District Attorney's Office, *viz.*, (1) the institution and implementation of grossly and recklessly or deliberately inadequate policies, procedures and regulations of the defendant City, of the Police Department, and of the District Attorney's Office, respecting the safeguarding of the Constitutional rights of accused persons, the truthfulness of testimony to be offered for the prosecution in criminal cases, the handling and disclosure of exculpatory evidence, the proper and competent conduct of criminal investigations and the avoidance of unjust convictions, and/or (2) a gross and reckless or deliberate failure by the defendant City, by

the Police Department; and by the District Attorney's Office, to properly instruct, train and supervise police and prosecutorial personnel as to such matters. In particular, and among other things:

(a) The Police Department at all relevant times had no written policies, procedures or practice guides, and gave no training or wantonly insufficient training to its personnel (including Detective Powell), respecting (i) the proper handling of exculpatory information and, more generally, the protection of Constitutional rights of accused persons; (ii) the proper handling of pretrial statements of prosecution witnesses; and (iii) the basic duty of the police, as an investigative agency, to pursue not only the conviction of the guilty but the exoneration of the innocent.

(b) The Police Department at all relevant times had no written policies, procedures or practice guides, and gave no training or wantonly insufficient training to its personnel (including Detective Powell), respecting the proper working relationship between the Police Department and the District Attorney's Office in criminal investigations and prosecutions. The Police Department's deficiencies in this respect included, but were not limited to, a failure to give appropriate guidance to its personnel as to how to respond if confronted by unlawful, unconstitutional or otherwise improper conduct on the part of District Attorney's Office personnel in the course of such investigations or prosecutions.

(c) The Police Department at all relevant times wantonly failed to sufficiently and appropriately train and instruct its personnel (including Detective Powell) as to their duties to be truthful and accurate when giving testimony themselves and to seek only such testimony from non-Police witnesses.

(d) Through the time of plaintiff's trial, the District

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Attorney's Office had no training program of any significance for incoming Assistant District Attorneys. By reason of that blatant deficiency, and otherwise, the Office wantonly failed to appropriately train and instruct Zsuffa, Schmier, ADA Doe and other Assistants as to, *inter alia*, (i) their obligations to recognize and disclose exculpatory information and to avoid the use of perjured evidence; (ii) their obligations otherwise to safeguard and protect the Constitutional rights of accused persons; and (iii) their fundamental duty as prosecutors to avoid unjust convictions (even at the expense of "losing" cases).

(e) The District Attorney's Office at the time of plaintiff's trial had no written policies, procedures or practice guides concerning (i) the prosecutor's duty to disclose exculpatory material, (ii) the prosecutor's duty to disclose pretrial statements of prosecution witnesses, or (iii) the prosecutor's duty to avoid the introduction of perjured evidence.

(f) The District Attorney's Office failed, until at least two years after plaintiff's trial, to institute any system for active supervision of trial Assistants by competent supervisors.

(g) The resultant absence of supervision was particularly critical as to the handling of exculpatory information uncovered by police and prosecutorial personnel, as the District Attorney's Office itself has now belatedly acknowledged: it is now, but was not in 1971, required procedure for trial Assistants in that Office to consult with supervisors as to the need to disclose exculpatory information to the defense.

(h) The District Attorney's Office at all relevant times lacked any practice to review the quality of the job performance of Assistant District Attorneys in any fashion that would disclose

whether the Assistants were properly discharging their obligations to disclose exculpatory material and not to adduce perjured testimony.

(i) The District Attorney's Office in 1971 was an extremely high-volume operation which permitted Assistant District Attorneys to devote only a limited amount of time to any particular case. As was obvious at the time, this circumstance made it all the more critical that Assistants receive proper training and supervision in such important matters as the need to recognize and disclose exculpatory information.

(j) The Police Department's deficiencies set forth in subparagraphs (a)-(c) of this paragraph 39 and the District Attorney's Office's deficiencies set forth in subparagraphs (e)-(i) of this paragraph 39 were collectively, and each such deficiency was individually, a substantial factor in bringing about the aforesaid violations of plaintiff's Constitutional rights.

40. At all relevant times, there was no personal animosity of any sort between plaintiff and any of the police or prosecutorial Conspirators. Indeed, plaintiff had had no contact whatever with any of such Conspirators prior to his arrest for the Crimes. Under the circumstances, conduct like the Conspirational conduct complained of herein would not ordinarily have occurred in the absence of gross and wanton deficiencies in police and prosecutorial training and supervision.

41. The City's Police Commissioner, personally and/or through his authorized delegates, at all relevant times had final, discretionary authority to promulgate and implement policies and procedures, including policies and procedures as to personnel training and supervision, with respect to the Police Department's

performance of its duties. Under the principles of municipal liability for federal civil-rights violations, the City's Police Commissioner (and/or his authorized delegates) constituted a City "policy maker" and owed plaintiff and the public a duty, breached in this case, to avoid deliberate indifferenee to the Constitutional rights of persons coming into contact with the Police Department.

42. The Distriet Attorney, personally and/or through his authorized delegates, at all relevant times had final, discretionary authority to promulgate and implement policies and procedures, including policies and procedures as to personnel training and supervision, with respect to his Office's performance of its duties. Under the principles of municipal liability for federal civil-rights violations, the District Attorney (and/or his authorized delegates) constituted a City "policy maker" and owed plaintiff and the public a duty, breached in this case, to avoid deliberate indifference to the Constitutional rights of persons coming into contact with his Office.

43. The foregoing violations of plaintiff's Constitutional rights constituted Constitutional torts and were effected by actions undertaken under color of law, statutes and regulations of the State of New York.

44. By reason of the foregoing, defendant is liable to plaintiff, pursuant to 42 U.S.C. § 1983, an amount not less that $11,000,000.

SECOND CLAIM

45. Plaintiff repeats and realleges the allegations of paragraph "1" through "36" above.

46. At all relevant times, Detective Powell, Zsuffa, Schmier,

ADA Doe and the other Conspirators prosecuted plaintiff with actual malice and without probable cause to believe plaintiff guilty of the Crimes.

47. The City is responsible for the Conspirators' misconduct under principles of *respondeat superior.*

48. By virtue of the foregoing, defendant is liable to plaintiff, pursuant to the New York law of malicious prosecution, in an amount not less than $11,000,000.

WHEREFORE, plaintiff demands TRIAL BY JURY of all issues in this action, and further demands JUDGMENT against defendant as follows:

I. For compensatory damages in an amount not less than $11,000,000.

II. For reasonable attorneys' fees, together with costs and disbursements, pursuant to 42 U.S.C. § 1988 and to the inherent powers of this Court.

III. For pre-judgment interest as allowed by law.

IV. For such other and further relief as to this Court may seem just and proper.

Dated: New York, New York
June 6, 1991

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Respectfully submitted,

s/ DS Liebhafsky
Douglas S. Liebhafsky
WACHTELL, LIPTON, ROSEN & KATZ
299 Park Avenue
New York, New York 10171
(212) 371-9200
(DL 6457)

Attorneys for Plaintiff